

FILE COPY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re:) MDL Docket No. 1376

ZONOLITE ATTIC INSULATION PRODUCTS LIABILITY LITIGATION

PAUL PRICE, JOHN PREBIL and
MARGERY PREBIL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

Civil Action No. CV-0071-M-DWM
(Transferred from the District of
Montana, Missoula Division)

W.R. GRACE & COMPANY (a Delaware corporation); W.R. GRACE & COMPANY CONN. (a Connecticut Corporation); W.R. GRACE & CO., a/k/a GRACE, an association of business entities; SEALED AIR CORPORATION (a Delaware corporation).

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The plaintiffs in *Price, et al. v. W.R. Grace & Company, et al.*, C.A. No. CV 0071-M-DWM (transferred from the District of Montana, Missoula Division)(the “*Price Action*”) move this Court to enter an order certifying the following class:

All persons who own or occupy real property in the United States in which Zonolite Attic Insulation has been installed, excluding residents of the State of Washington in which a state-wide class has been certified (the "Proposed Class").

The Proposed Class satisfies the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2), and/or 23(b)(3), 23(b)(1)(A) and 23(b)(1)(B) for the reasons set forth in the supporting memorandum of law. Plaintiffs in the other actions join in the instant motion for class certification.^{1/}

By this motion, plaintiffs seek the appointment of Paul Price, John Prebil and Margery Prebil as class representatives and, as class counsel, the appointment of *Price* counsel and each of the members of the Plaintiffs' Executive Committee. (The Plaintiffs' Executive

¹⁴ Those actions are: Lindholm and Szufnarowski v. W.R. Grace & Company, et al., C.A. No. 00 CV 10323 (PBS) (D. Mass.); Hunter v. W.R. Grace & Company, et al., C.A. No. 00-569-GPM (transferred from S.D. Ill.).

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2 Management Order No. 1 will constitute formal appointment of that committee).

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4 Authorities in Support of Motion for Class Certification and Notice, the Affidavits of Thomas M.
5 Sobol and Richard Lewis (with Exhibits), and all pleadings and documents already filed in this
6 action.

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- 8 1. Certifying the Proposed Class;
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- 10 3. Appointing *Price Action* counsel and the members of the Plaintiffs' Executive Committee as class counsel; and
- 12 4. Directing that notice be provided to members of the class.

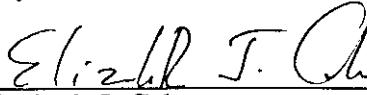
13 **CERTIFICATION UNDER LOCAL RULE 7.1 (A)(2)**

14 Undersigned counsel certify that they have conferred with counsel for the defendants and
15 have attempted in good faith to resolve or narrow the issues raised by this motion.

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1 DATED: January 23, 2001

Respectfully submitted,

2 By: 

Elizabeth J. Cabraser,
Plaintiffs' Executive Committee and as
Proposed Class Counsel

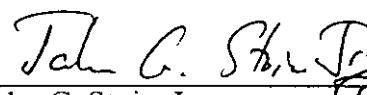
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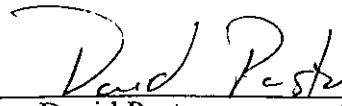
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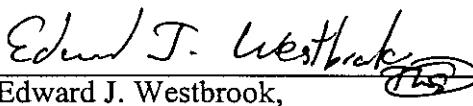
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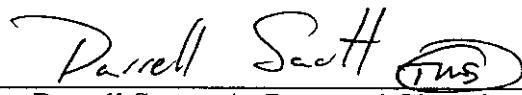
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association of business entities; SEALED)
AIR CORPORATION (a Delaware)
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Respectfully submitted,

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1 DATED: January 23, 2001

Respectfully submitted,

2 By:

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21 Attorneys for Jan Hunter

CERTIFICATE OF SERVICE

I, Thomas M. Sobol, hereby certify that on January 23, 2001, I caused to be served the following documents:

1. Plaintiffs' Motion for Class Certification; U.S. District Court
2. Plaintiffs' Unopposed Motion for Leave to file Memorandum of Points and Authorities of Fifty Pages;
3. Memorandum of Points and Authorities in Support of Motion for Class Certification and Notice;
4. Declaration of Attorney Richard S. Lewis [and exhibits];
5. Affidavit of Attorney Thomas M. Sobol [and exhibits];
6. Cover Letter to Clerk of Court;
7. Cover letter to the Honorable Patti B. Saris; and
8. Certificate of Service.

upon all interested parties by serving a copy thereof upon counsel as follows:

DEFENSE COUNSEL

a copy by hand upon counsel of record:

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Casner & Edwards
One Federal Street
Boston, MA 02110

James R. Carroll
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Sheila Birnbaum
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New York, NY 10036

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v. }

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND NOTICE

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1 I. INTRODUCTION

2 This case involves the threat to public health posed by W. R. Grace's knowing
 3 concealment of the extraordinary hazards of its asbestos-contaminated Zonolite Attic Insulation.
 4 Over many years, Defendant W.R. Grace & Company and its related entities (collectively, "Grace")
 5 mined asbestos-contaminated vermiculite in Montana, and processed and sold it nationwide as
 6 Zonolite Attic Insulation. Grace knew that the insulation contained asbestos and that by normal
 7 handling asbestos fibers would become airborne, producing dangerously high exposures and
 8 contamination. As early as the 1950s, undisclosed corporate testing of Libby, Montana workers
 9 revealed that they were suffering severe chronic and acute illness from exposure to the same
 10 asbestos-contaminated materials. In 1969, Grace's safety manager urged, to no avail, that the
 11 company place warnings on its Zonolite Attic Insulation products. Grace concealed these deadly
 12 asbestos hazards from its workers, consumers, and public officials. Grace never mentioned the
 13 presence of asbestos in its Zonolite insulation packaging or products as it continued sales over many
 14 years. As a result, tens of thousands of persons now live in homes that, unbeknownst to them, are
 15 contaminated with asbestos-containing Zonolite insulation.

16 Plaintiffs now seek class certification under Rule 23(b)(2), or alternatively under Rules 23
 17 (b)(3) and (b)(1)(B), for all claims for injunctive and other equitable relief, as well as all claims for
 18 punitive damages. The proposed class consists of:

19 All persons who own or occupy real property in the United States in
 20 which Zonolite Attic Insulation has been installed, excluding residents
 21 of the State of Washington in which a state-wide class has been
 22 certified (the "Proposed Class").

23 Class certification is necessary to fairly and efficiently resolve overwhelmingly
 24 common questions of law and fact. Central to the claim of every class member is proof that Zonolite
 25 Attic Insulation contains asbestos which poses extraordinary health and contamination hazards. This
 26 proof is common to all class members and does not depend on the knowledge or conduct of any
 27 plaintiff. Even Grace's primary defense -- that Zonolite Attic Insulation does not contain hazardous
 28 levels of asbestos -- presents issues common to all class members. Also common to the class is
 proof that Grace knew of the hazards yet consciously concealed them in order to maximize its own
 profits.

1 Class certification under Fed. R. Civ. P. 23(b)(2) is the best and most practicable
 2 means of fairly adjudicating the central issue pervading this case — whether or not Zonolite Attic
 3 Insulation poses hazards which merit equitable relief of asbestos notification, education and
 4 remediation. The Honorable Kathleen O'Connor's recent decision certifying a state-wide class of
 5 Washington residents pursuing identical relief shows the suitability of class treatment in this action.
 6 *Barbanti v. W.R. Grace & Co.*, No. 00-2-01756-6 (Spokane Co. Sup. Ct. Nov. 28, 2000). Here, the
 7 *Price* plaintiffs meet the same requirements for a mandatory, non-opt out injunctive relief class.

8 Class certification of claims for equitable relief -- relief in the form of asbestos
 9 notification, education and remediation -- seeks to create a procedural mediation by which to
 10 preserve class members' health and to prevent serious avoidable injuries and death caused by
 11 asbestos exposure. Whether the requested relief is necessary, and what precise form the health and
 12 safety warnings and remediation programs should take, also present common issues of fact spanning
 13 the proposed class. The class-wide determination of these issues on the merits at trial will fairly and
 14 efficiently dispose of the equitable claims of thousands of people living in homes with asbestos
 15 contaminated Zonolite Attic Insulation.

16 The highest and best use of judicial resources in this case is the class-wide exercise of
 17 equitable power to prevent human suffering and avoidable property contamination, rather than
 18 after-the-fact money judgments which seek to compensate for avoidably injured or lost family
 19 members. Further, a major benefit of the class action device available in this case is its provision of
 20 procedures to ensure vindication of "the rights of groups of people who individually would be
 21 without effective strength to bring their opponents into court at all." *Amchem Prods. v. Windsor*,
 22 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) (quoting *Mace v. Van Ru Credit*
 23 Corp., 109 F.3d 338, 344 (7th Cir. 1997)). That benefit applies here.^{1/}

24
 25 ^{1/}Only an equitable remedy will ensure that available remediation funds are reserved for
 26 actual asbestos remediation-related purposes. Although this Court could alternatively certify an
 27 opt-out class seeking monetary damages under Rule 23(b)(3) alongside the Rule 23(b)(2) class, the
 28 incidental damages at issue here are properly included in the proposed Rule 23(b)(2) class.
 Absent class certification, class members will be stripped of any practicable means of seeking
 recourse from Grace's extraordinary wrongdoing and will remain vulnerable to dangerous (and
 otherwise avoidable) future asbestos exposures.

1 Class certification of all claims for punitive damages serves similarly sensible
 2 procedural and jurisprudential goals. A common issue for all proposed class members is whether
 3 Grace's conduct with respect Zonolite Attic Insulation warrants punitive damages. Resolution of
 4 punitive damages liability and exposure on a mandatory class-wide basis also achieves finality for
 5 defendants and potential distributive justice for plaintiffs, goals that cannot likely be accomplished
 6 by seriatum litigation.

7 Zonolite Attic Insulation presents a serious threat to the health of all persons who own
 8 or occupy property that contain this asbestos product. Class certification is the appropriate
 9 procedural mechanism by which to adjudicate all claims for injunctive and other equitable relief,
 10 and for punitive damages.

11 **II. PROCEDURAL HISTORY**

12 This litigation consists of four constituent nationwide class actions and several
 13 additional potential tag-along actions centralized in this Court by order of the United States Judicial
 14 Panel on Multidistrict Litigation. The Judicial Panel found that the Zonolite actions involve
 15 common questions of fact because each involves allegations of property damage caused by the
 16 presence of tremolite asbestos in Zonolite Attic Insulation marketed by Grace. Two similar state-
 17 wide class actions are also pending in Washington and Minnesota. Counsel in all cases before this
 18 Court join in the *Price* plaintiffs' pending motion for class certification.

19 Motions for nationwide class certification and class notice have been filed and briefed
 20 by all of the parties in *Price v. W. R. Grace & Co.*, No. CV 0071-M-DWM, the constituent action
 21 transferred from the District of Montana. The *Price* Plaintiffs' class action complaint was filed in
 22 the District of Montana on April 14, 2000 on behalf of a proposed nationwide class of all owners or
 23 occupiers of real property with Zonolite Attic Insulation. All defendants subsequently appeared.
 24 Motions for class certification and class notice/preliminary injunction were filed by the *Price*
 25 Plaintiffs on or about July 25, 2000. Defendants opposed the motions on October 23, 2000 and the
 26 *Price* plaintiffs' reply papers were filed on or about November 3, 2000. Over two dozen depositions,
 27 of the parties and their experts, have already taken place in *Price* and/or in *Barbanti*, the Washington
 28 state court action which shares discovery with *Price*, and the parties' experts have performed testing

1 of the *Price* and *Barbanti* Plaintiffs' homes. The *Price* court did not conduct oral argument and did
 2 not issue a ruling on the plaintiffs' class certification motions prior to MDL transfer.

3 In the companion case pending in Washington state court, *Barbanti v. W.R. Grace &*
 4 *Co.*, Case No. 00 2 01756-6 (Spokane Co.), the Honorable Kathleen O'Connor has certified a
 5 state-wide class, under Washington's equivalent to Fed. R. Civ. P. 23(b)(2),^{2/} by memorandum
 6 decision dated November 28, 2000, which was entered by Order of December 19, 2000. *See*
 7 *Barbanti* Order Granting Plaintiff's Motion for Class Certification Pursuant to CR23(b)(2),
 8 (December 19, 2000). *See* Lewis Declaration Exhibit (hereinafter "Exhibit") 1. In pertinent part,
 9 Judge O'Connor found that "Plaintiffs focus on a common course of conduct by the Defendants
 10 towards all potential class members; i.e., a pattern of alleged misrepresentation in advertising, failure
 11 to warn, etc. . . ." Memorandum Decision [Class] Motion #1 (November 28, 2000) at p. 3
 12 (Exhibit 2). In addition, the Washington Court found the *Barbanti* litigation to serve the salutary
 13 purposes of class action litigation in achieving judicial economy and finality for the parties. *Id.* at
 14 pp. 5-6. ("The purpose of class action litigation is to allow individuals, who have common causes of
 15 action, to pool their resources and pursue legal relief which would otherwise be unavailable due to
 16 the cost of litigation and the individual amount of damages involved. It is also a benefit to both
 17 Plaintiffs and Defendants that putative class members litigate the class issues in one proceeding to
 18 avoid inconsistent adjudication.")^{3/}

19 Judge O'Connor then addressed notice. After a multi-day evidentiary hearing Judge
 20 O'Connor ordered that a "neutral" class notice, including information from governmental public
 21 health agencies, should issue pursuant to Washington Civil Rule 23(d)(2), which is analogous to the
 22 federal rule, and denied plaintiffs' request for "emergency" notice relief under Rule 65(a), finding
 23 that there were factual issues in dispute. Memorandum Opinion [Notice] Motion No. 2 at pp. 2-4
 24 (December 19, 2000) (Exhibit 3); Order Denying Plaintiffs' Motion for Preliminary Injunction and
 25

26 ^{2/}Washington State's CR 23(b)(2) is identical to Fed. R. Civ. P. 23(b)(2) and Washington
 27 courts are guided by federal authority in applying Rule 23. *Dore v. Kinnear*, 79 Wash.2d 755, 787,
 489 P.2d 898, 916 (1971).

28 ^{3/}Defendants filed a Notice for Discretionary Review on January 17, 2001.

1 Emergency Notice to Class Members (Exhibit 4) (to be supplied when available). In support of this
 2 ruling, the *Barbanti* court found that “notice to potential class members of the existence of this
 3 litigation is appropriate even though not required when a class is certified under Civil Rule
 4 CR23(b)(2).” Memorandum Opinion [Notice] Motion No. 2 at p. 2 (Exhibit 3). The *Barbanti* court
 5 has requested proposed Rule 23(d)(2) forms of notice from the parties. The Plaintiffs’ proposed
 6 forms of notice is attached as Exhibit 5; the Defendants’ proposed notice will be supplied when
 7 available. The *Barbanti* court will review each form of notice, and approve a notice.

8 In addition to finding that a Rule 23(d)(2) notice should issue in *Barbanti*, Judge
 9 O’Connor also rejected defendants’ argument based on the doctrine of primary jurisdiction. In her
 10 class certification opinion, the Court noted the following:

11 Finally, defendants rightly point out that asbestos is heavily regulated
 12 by federal agencies and Zonolite is under review by the EPA.
 13 Arguably, the resources of a federal regulatory agency are greater than
 14 a state superior court and this court has considered that fact. However,
 15 federal regulation does not preclude class litigation or preempt the
 16 court’s ability to take jurisdiction.

17 Memorandum Decision (Motion #1) at p. 6 (attached as Exhibit 2).

18 In support of plaintiffs’ request to this MDL Court for nationwide notice (excluding
 19 the State of Washington and any other statewide certified class), plaintiffs now rely exclusively on
 20 the authority of Fed. R. Civ. P. 23, and Rule 23(d)(2) in particular; and hereby withdraw the *Price*
 21 argument for the “emergency” notice under Rule 65(a). This approach is consistent with the class
 22 certification and order authorizing a neutral notice in *Barbanti*, as well as this Court’s schedule for
 23 prompt consideration of class certification, including the notice issue.

24 **III. STATEMENT OF FACTS**

25 This motion is brought by the *Price* plaintiffs on behalf of a class comprised of all
 26 owners or occupiers of real property located throughout the United States in which Zonolite Attic
 27 Insulation has been installed, excluding residents of the State of Washington where a state-wide class
 28 seeking identical relief has been certified. Defendants are the manufacturers of Zonolite attic
 insulation or their alter egos or agents. The claims asserted in this action against Grace include
 negligence, deceit, fraudulent concealment, fraud and strict liability. Plaintiffs seek equitable relief
 in the form of a defendant-funded asbestos notification, education and remediation program.

1 A. Grace's Manufacturing and Marketing of Zonolite Attic Insulation Occurred
 2 with its Full Knowledge That it Contained Asbestos and Was Hazardous.

3 For many decades, W.R. Grace & Company ("Grace") and its predecessor, Zonolite
 4 Company, mined, milled and processed vermiculite in Libby, Montana. Vermiculite, a form of mica,
 5 makes a satisfactory insulating material when exfoliated (heated and expanded) in a furnace. Prior to
 6 the mid-1980s, Grace was the leading producer of vermiculite-based insulation products in the
 7 United States. Grace manufactured and sold over three thousand tons of vermiculite each year
 8 including sales of over eighty-eight thousand bags of Zonolite attic insulation each month. *See* 1978
 9 Performance Report of W.R. Grace's U.S. Zonolite operations (April 3, 1975) [sic] (Exhibit 6) and
 10 R.J. Bettacchi Monthly Report Memo (October 7, 1983) (Exhibit 7).

11 Zonolite Attic Insulation was one of Grace's vermiculite-based products sold
 12 nationwide. The vermiculite used in Grace's products, including Zonolite Attic Insulation, contained
 13 asbestos. The raw vermiculite used in Grace's product contained up to 21% asbestos. Letter from
 14 Wake to Byers (September 12, 1956) (Exhibit 8). Despite its recognition of the hazards of asbestos,
 15 Grace never completely removed the asbestos from its finished vermiculite-based products,
 16 including Zonolite Attic Insulation. Grace's testing showed that its finished vermiculite products
 17 contained asbestos in amounts up to and exceeding 5% by weight. Memo from Yang to Wood
 18 (April 19, 1977) (Exhibit 9).

19 Moreover, weight is not a precise measure of risk presented by residential exposure
 20 to asbestos. The asbestos fibers in tremolite are so small that millions of them are present in a tiny
 21 portion of an asbestos product, yet they are barely detectable by weight. In *Harashe v. Flintkote Co.*,
 22 848 S.W.2d 506 (Mo. Ct. App. 1993), expert testimony established that 600 billion tremolite fibers
 23 would constitute approximately the volume of the cap of a fountain pen. *Harashe*, 848 S.W.2d at
 24 508. In *Harashe*, the jury found that plaintiff's fatal mesothelioma disease was caused by Zonolite
 25 Attic Insulation. The appellate court upheld that verdict. Though potentially lethal to the lungs,
 26 asbestos fibers are invisible to the naked eye and can only be identified through the use of
 27 microscopic equipment used by highly trained professionals. Memo from Wood on Tremolite in
 28 Vermiculite at 9 (May 24, 1977) (hereinafter "Wood Memo") (Exhibit 10).

1 Grace's Zonolite Attic Insulation was marketed and used as a "do-it-yourself" product
 2 to be installed by homeowners immediately following construction or during remodeling. Most of
 3 this material was installed in homes before 1985. It is common for older homes to be in need of
 4 maintenance, repair and remodeling involving rewiring, installation and replacement of fixtures and
 5 utilities in ceilings, attics, and walls, and similar dust-creating and dust-disturbing activities. *See*
 6 U.S. Census Bureau data compilations (Exhibits 11, 12 and 13). The Zonolite Attic Insulation
 7 product itself is a granular substance that was poured out of large bags into spaces between the roof
 8 and the ceiling. The granules are small, about the size of a pencil eraser. After years in the attic, the
 9 product may darken and lose some structure and become more dust-like or sand-like.

10 The facts described herein show that homeowners, members of the class, are
 11 generally unaware of asbestos in Grace's Zonolite Attic Insulation and the dangers posed when this
 12 product is disturbed. As a result, homeowners nationwide are unwittingly disturbing Grace's
 13 Zonolite Attic Insulation during maintenance, repair, and remodeling and are at risk of causing
 14 dangerous asbestos exposures and contamination without any knowledge of the hazard and the need
 15 for precautions in order to minimize exposure and contamination.

16 As contrasted with class members' lack of knowledge of the Zonolite Attic Insulation
 17 hazards, Grace and Grace's predecessor, the Zonolite Company, have been aware of the serious
 18 health hazards associated with asbestos in their vermiculite since the 1950s. Montana State Board of
 19 Health Report on Industrial Hygiene Study of the Zonolite Company (August 8-9, 1956) (Exhibit
 20 14) and Dr. Cairns letter to Bleich (July 20, 1959) (Exhibit 15).

21 In the 1960s, recognition of the asbestos hazard in Libby vermiculite was confirmed
 22 repeatedly, as demonstrated in documents from Grace's predecessor the Zonolite Company, the
 23 Montana State Board of Health, and Grace itself. *See* Grace letter from Lovick (June 14, 1961)
 24 (Exhibit 16); Chicago Daily News Article (October 6, 1964) (Exhibit 17); Montana Board of Health
 25 letter to Bleich (May 11, 1964) (Exhibit 18) and Lovick Memo (December 23, 1969) with Study and
 26 Graph (Exhibit 19) (showing 90% of Zonolite/Libby employees suffered lung disease). Grace's
 27 safety manager knew in the late 1960s that Grace's vermiculite-based products were contaminated
 28 with asbestos which occurred in the vermiculite ore. Accordingly, he advised:

1 I think it well at this time, with the advice of counsel, to consider
 2 applying a warning or precautionary label or statement on all
 3 containers of products containing vermiculite. This may aid our
 defense in cases of product liability claims.

4 Memo to Kostic from Dugan (March 31, 1969) (Exhibit 20). This was not done.

5 In 1977, in an exhaustive report done by Grace with the benefit of extensive product
 6 testing and consultation with its own legal counsel, including the corporate legal division, Grace
 7 found that former Libby employees were suffering a "risk of lung cancer . . . five times the national
 average." The report went on to state in a section entitled "Harm to Customers," that "[t]he highest
 8 level of exposure is for Attic Insulation and Masonry Insulation. The high concentrations of
 9 upwards of 15 fibers per milliliter ["f/ml"] (15 minute maximum) for attic insulation . . . were
 10 observed . . ." In a telling conclusion to its exhaustive report, Grace stated that "a decision to label
 11 our consumer products would eliminate the risk of future liability, while exacerbating the risk of
 12 claims . . . from past use of the product." "Wood Memo" at 1909, 1919 and 1924 (Exhibit 10).

13 In the 1970s, Grace documented the dangerous level of airborne asbestos that resulted
 14 from pouring attic insulation and seriously considered discontinuing the production and sale of
 15 vermiculite products due to these hazards. "Wood Memo" at 1917 (Exhibit 10), Memo from Brown
 16 to Locke (March 11, 1976) (Exhibit 21). Nevertheless, Grace continued to sell Zonolite Attic
 17 Insulation until 1984, without warning consumers about the asbestos and the cancer hazard
 18 associated with this product. As clearly noted in its exhaustive 1977 analysis, Grace's decision not
 19 to provide such an asbestos warning was motivated by its concern that warnings would increase the
 20 risk of claims, and thus reduce the profitability of Zonolite Attic Insulation. "Wood Memo" at 1921
 21 (Exhibit 10) and Junker Deposition at 84 (October 23, 1991) (Exhibit 22).

22 In 1985, one year after Grace discontinued the production and sale of Zonolite Attic
 23 Insulation, Grace performed a risk assessment of workers exposed to asbestos from vermiculite
 24 products nationwide and estimated that 30,000 lung cancers would result from such exposures.
 25 Walsh Memo (November 1, 1985) (Exhibit 23). The lethal effect of exposure to this asbestos
 26 compound was unequivocally known to Grace as a result of its own health data on its workers and its
 27 own product testing data. Although armed with sufficient knowledge of the asbestos hazard from
 28 Zonolite Attic Insulation as early as the 1960s, Grace did not issue an asbestos warning to consumers

1 then, or at any subsequent point from 1960 until today, as it acquired more and more compelling
 2 information identifying this hazard. Instead, the company decided to forego asbestos warnings and
 3 take their chances in defending themselves against lawsuits brought by persons injured by this
 4 product.

5 **B. The Asbestos in Grace's Zonolite Attic Insulation Is An Ongoing Serious Health**
 6 **Hazard to Homeowners Who Conduct Routine Household Maintenance in Their**
 7 **Attics.**

8 The disturbance of readily airborne asbestos as a result of home maintenance, repair,
 9 and remodeling is a severe health hazard to persons conducting maintenance and to members of the
 10 household where such work is done. This hazard is amplified as a public health threat given the
 11 widespread use of Zonolite Asbestos Insulation and because routine homeowner renovation is so
 12 prevalent. Nationwide thousands of homes with Zonolite Attic Insulation undergo renovation each
 13 year.

14 These facts recently compelled the U.S. Environmental Protection Agency ("EPA"),
 15 to issue an advisory describing the vermiculite attic insulation problem and the precautionary steps
 16 for a homeowner to take. The advisory first describes the problem as follows:

17 If disturbed, asbestos fibers in vermiculite insulation may get into the
 18 air. These fibers can be inhaled and become trapped in the lungs
 where they may cause diseases such as asbestosis, lung cancer, and
 mesothelioma. These diseases can develop many years after exposure
 to asbestos.

19 *Asbestos in Vermiculite Insulation*, U.S. EPA Office of Pollution Prevention and Toxics at 1
 20 (December 29, 2000) (Exhibit 24).⁴

21 The EPA advisory details the considerable precautionary procedures to be instituted if
 22 disturbance of the insulation does occur, including the use of accredited asbestos removal
 23 professionals to perform product identification, risk assessment, product removal and contamination
 24 "clearance" testing – skills and tasks well beyond the know-how of a layperson class member. For
 25 example, the advisory recommends:

26
 27 ⁴This description of the health risk is confirmed by the expert opinion of Dr. Henry A.
 28 Anderson, a medical doctor/epidemiologist with two decades of experience with asbestos research.
 See Affidavit of Henry A. Anderson, M.D. (July 20, 2000), ¶ 7 (Exhibit 25).

If you are planning to remodel or replace vermiculite insulation, have it tested first.

- EPA recommends using a trained and accredited professional to conduct the tests. If you decide to remove the vermiculite home insulation, use accredited, licensed asbestos removal professionals. Use of a “negative pressure enclosure” technique will prevent fibers and dust from escaping from the attic into the rest of the home. **Do not attempt to do this yourself.** You could spread asbestos fibers throughout your home, putting you and your family at risk of inhaling asbestos fibers.
- After the vermiculite insulation is removed, you may want to consider having air monitoring tests done in your attic and throughout the living areas of your home. This is to ensure that the concentration of asbestos fibers in the home is low or not present.

Id. at 2-3 (emphasis in original).^{5/}

The public health threat is manifest. Even though Grace marketed Zonolite Attic Insulation as a “do-it-yourself” home improvement product without warnings, **the assessment, remediation and control of the hazard is absolutely not a “do-it-yourself” endeavor**, and can only be safely and effectively accomplished by adequately informed professional asbestos abatement personnel.^{6/}

Three central liability issues -- the risks of Zonolite Attic Insulation, the necessity to avoid disturbance, and the need for professional assistance to address the problem -- are confirmed

^{5/}These procedures are consistent with recognized practices to prevent hazardous exposures to asbestos in schools and other buildings. See “Guidance for Controlling Asbestos-Containing Materials in Buildings,” U.S. EPA (1985) (known as the “Purple Book”) (“However, when ACM [asbestos-containing material] is damaged or disturbed – for example, by maintenance or repairs conducted without proper controls – asbestos fibers are released. These fibers can create a potential hazard for building occupants.”) (Exhibit 26); “Managing Asbestos in Place,” U.S. EPA (1990) (known as the “Green Book”) ([“A]sbestos materials can become hazardous when, due to damage, disturbance, or deterioration over time, they release fibers into building air. Under these conditions, when ACM is damaged or disturbed – for example, by maintenance repairs conducted without proper controls – elevated airborne asbestos concentrations can create a potential hazard for workers and other building occupants. As this guide will explain in some detail, in-place management does not mean “do nothing.” It means having a program to ensure that the day-to-day management of the building is carried out in a manner that minimizes release of asbestos fibers into the air. . . .”) (Exhibit 27) Affidavit of Donald J. Hurst (May 25, 2000), President of Fulcrum Environmental Consulting at ¶ 21-24 (identifying the need for safety precautions to minimize exposure and stressing need for use of specifically trained professionals) (Exhibit 28).

^{6/}*Asbestos in Vermiculite Insulation*, US EPA Office of Pollution Prevention and Toxics at 3 (December 29, 2000) (Exhibit 24 at 3). Other similar public health advisories were issued by EPA Region I, Region X, and the Centers for Disease Control (“CDC”), Agency for Toxic Substances Disease Registry (ASTDR”). See also Exhibits 29, 30, and 31.

1 by a review of Grace's own documents, the asbestos abatement literature and specific field testing
 2 performed by professional environmental consultants in this litigation.

3 Scientific testing simulating home maintenance, repair and remodeling recently
 4 performed by both Materials Analytical Services and Fulcrum Environmental Consulting,
 5 environmental consultants in this litigation,^{7/} demonstrate dangerous levels of airborne asbestos
 6 during routine household remodeling. Testing in the Spokane, Washington home of Susan and Rand
 7 Hatch demonstrated that the demolition of walls, drilling of holes in a ceiling, shoveling and
 8 vacuuming of attic insulation, emptying the vacuumed material into bags, and the sweeping of the
 9 dust resulted in airborne asbestos levels ranging from .31 to 5.6 fibers per cubic centimeter ("f/cc")
 10 when analyzed by phase contrast microscopy. (Exhibit 28 at Exhibit B). In addition, dust found on
 11 horizontal surfaces in the vicinity of the renovation was found to contain actinolite-tremolite
 12 asbestos. *Id.*

13 Similarly, in the Spokane, Washington home owned by Marco Barbanti, it was
 14 determined that simply scooping the vermiculite using a tin dust pan and pouring it into a bag
 15 resulted in airborne asbestos concentrations ranging from 6.96 to 12.48 structures per cubic
 16 centimeter ("str/cc"). *See* Affidavit of Richard Hatfield (July 18, 2000) at ¶ 16 (Exhibit 32). The
 17 dust below the vermiculite contained approximately 47 million structures per square foot of asbestos.
 18 *Id.*

19 These measurements exceed current Occupational Safety and Health Administration
 20 ("OSHA") and Environmental Protection Agency ("EPA") standards and are clearly unsafe for
 21 homeowners and their families. *See* Affs. of Anderson at ¶ 7 (Exhibit 25), Hatfield at ¶ 19-21
 22 (Exhibit 32), and Hurst at ¶ 14 (Exhibit 28). *See also* EPA Report to Congress of
 23 Asbestos-Containing Materials in Public Buildings (February 1988) at p. 5. (Exhibit 33) and OSHA
 24 Fed. Reg., Vol. 59, No. 153 (August 10 1994) at p. 40978 (Exhibit 34). The OSHA permissible
 25 exposure limit has continued to be reduced over the years, and is currently 0.1 fibers per cubic
 26 centimeter ("f/cc"). OSHA has stated that it expects worker exposure at this level will result in

27
 28 ^{7/}Mr. Hurst is a certified environmental consultant and the President of Fulcrum
 Environmental Consulting, Inc.; Mr. Hatfield is a certified environmental consultant and the Senior
 Asbestos Consultant at Materials Analytical Services.

1 significant risk (1994 OSHA Reg. 59 CFR at 40967). Further, the OSHA regulation prohibits
 2 workers from being exposed to airborne asbestos concentrations exceeding 1.0 f/cc for a period
 3 exceeding 30 minutes. (Exhibit 34) The EPA clearance level of 0.01 f/cc represents the airborne
 4 asbestos concentration below which a public building can be reoccupied following removal of
 5 asbestos. This standard involves aggressive testing in which dust on all surfaces is made airborne
 6 using a leaf blower. EPA Final Rule and Notice on Asbestos-Containing Materials in Schools, 52
 7 Fed. Reg. 41856 (Oct.30,1987) (Exhibit 34.1). The design of EPA clearance testing recognizes
 8 settled dust can be resuspended and cause an exposure hazard and recognizes the hazards associated
 9 with asbestos dust on surfaces.

10 In addition, Grace's own historical testing also has shown that use or disturbance of
 11 its finished vermiculite-based products results in dangerously high airborne concentrations of
 12 asbestos. In 1976, Grace conducted testing of its vermiculite attic fill insulation and determined that
 13 "attic fill tested in excess of the 5 fibre level generally and in excess of the 10 fibre ceiling in some
 14 instances." Grace concluded that "this necessitates a binder development program or other
 15 remedy."⁸ Also in 1976, Grace conducted simulated testing involving the pouring of Zonolite Attic
 16 Insulation and analyzed the air samples by a transmission electron microscope. All ten samples
 17 analyzed exceeded 4.5 f/cc. Memo to Hamilton (July 11, 1977) (Exhibit 35). In March 1980, Grace
 18 conducted additional testing of its Zonolite Attic Insulation and found that use of this product
 19 resulted in fiber levels of 0.971-2.597 f/cc, Letter from Wood to Ray (April 1, 1980) (Exhibit 36).
 20 Grace's Construction Products Division concluded internally that these results were of concern.
 21 Memo to McCord from Eaton (March 25, 1980) (Exhibit 37).

22 All of the measurements of asbestos released from Zonolite Attic Insulation described
 23 above, both contemporary and historical, field testing and laboratory testing, show that disturbance
 24 of Zonolite Attic Insulation presents a significant risk of health and property damage.

25 As explained by Dr. Henry A. Anderson, M.D., a medical doctor and public health
 26 official with extensive clinical and research experience with asbestos disease, exposure to asbestos

27 28 ⁸A "binder" program refers to the asbestos dust control concept of binding the asbestos fibers
 together to the product so the fibers cannot so easily be separated from the product and cause
 exposures.

1 can and does cause cancer and other lung disease. *See* Anderson Aff., ¶ 4-7 (Exhibit 25).
 2 Furthermore, medical research has established that asbestos is highly carcinogenic and there is no
 3 known safe level of exposure to asbestos. *Id.* NIOSH Pamphlet (April 1980) at p. 3 (Exhibit 38),
 4 EPA Study (February 1988) at p. 5 (Exhibit 33) and EPA Guidance Document ((March 1979) at
 5 Part I, p. 1 (Exhibit 39). The release of asbestos particles in confined spaces such as attics where
 6 persons lack proper protective equipment, such as air supplied respirators, will result in peak
 7 episodic exposures to asbestos.^{9/} *See* Affs. of Anderson at ¶ 7 (Exhibit 25), Hatfield at ¶ 23
 8 (Exhibit 28), ¶21-24. As explained by Dr. Anderson, based on the epidemiology and toxicology of
 9 asbestos, even non-occupational low-level exposures to asbestos can cause mesothelioma and other
 10 asbestos-associated diseases. *See* Anderson Aff., at ¶¶ 4, 7 (Exhibit 25).

11 Documented dangers are posed by residential exposure to Zonolite Attic Insulation.
 12 In *Harashe*, 848 S.W.2d at 507-508, a case where the plaintiff sued successfully for
 13 asbestos-induced cancer, the plaintiff sustained a limited number of exposures to dust from the
 14 Zonolite Attic Insulation – during installation, and during subsequent inspections of vents in the
 15 attic. In affirming the plaintiff's verdict against Grace, the court described plaintiff's exposures as
 16 follows:

17 Plaintiff used the insulation to insulate his attic by pouring the product between the
 18 joists of his ceiling. Because of the layout and confined space of the attic, he was
 19 required to place his face quite close to the insulation as it was being poured into the
 20 spaces between the joists. He testified that the insulation created heavy amounts of
 21 dust. Insulating the attic took approximately one day. Thereafter the plaintiff would
 22 go to the attic twice a year to check on a vent located there. On those occasions the
 23 attic was quite dusty. Several years after the attic work plaintiff bought additional
 24 Zonolite to insulate between walls. Again in installing this insulation plaintiff came
 into contact with heavy clouds of dust. In 1975 plaintiff utilized Zonolite to do
 additional insulating in the roof of a new addition and again functioned in quite dusty
 conditions in close proximity to the insulating product. The 1975 exposure would be
 on the very edge of the latency period of the plaintiff's expert and outside the latency
 period of the defendant's expert. From the testimony of the plaintiff we believe that a
 jury could find that the plaintiff sustained at least two heavy exposures to dust from
 the Zonolite.

25
 26 ^{9/}EPA Proposed Identification and Notification (September 17, 1980) (Exhibit 40) and EPA
 27 Guidance document (March 1983) at 1-1 (Exhibit 41). Notably, EPA has declared that "since peak
 28 exposures to asbestos in schools entail risks of serious injuries . . . EPA finds that these exposures
 present an unreasonable risk and should be reduced accordingly." *Id.* at 61972-73. EPA has noted
 that while peak concentrations may be high for brief periods, time-waited averages calculated for an
 eight-hour period, are often deceptively low. EPA Airborne Asbestos Assessment Updated (June
 1986) at 72 (Exhibit 42).

1 *Id.*

2 Historical testing done by Grace and recent testing done in homes with Zonolite Attic
 3 Insulation by certified environmental consultants demonstrate that disturbances of Zonolite Attic
 4 Insulation are causing and will continue to cause hazardous exposures. These dangerous exposures
 5 will go on unless homeowners are properly notified.

6 **C. Without Effective Notice, Homeowners Are Ignorant of the Extreme Hazard**
 7 **from Disturbing the Zonolite Attic Insulation Product and Remain at**
Preventable Risk.

8 Grace's Zonolite Attic Insulation was sold to homeowners as a "do-it-yourself"
 9 product. Remarkably, in product literature and on its Zonolite bags, Grace affirmatively represented
 10 to homeowners that Zonolite Attic Insulation "pours easily and cleanly," does not require "mask
 11 gloves or special equipment," and "[c]ontains no harmful chemicals." Zonolite brochure and bag
 12 (Exhibit 43). Further, Grace depicted in its literature and on its bags a person pouring the material
 13 without any safety precautions whatsoever, including no mention of respiratory protection, noting the
 14 material was "non-irritating to the lungs," and an appropriate activity for "family fun." Exhibit 44.^{10/}
 15 See also, Zonolite advertisement (November 1960) and brochure (1950) and other undated
 16 advertisements (Exhibit 44). Grace has never corrected this dangerously misleading information,^{11/}

17

18 ^{10/}With Grace's Zonolite Attic Insulation, an examination of construction records, such as
 19 Grace's product literature, would not disclose the presence of asbestos. Further, a visual inspection of
 20 the insulation (without specific knowledge of the physical characteristics of Zonolite Attic
 21 Insulation) would not disclose the presence of asbestos since asbestos fibers are invisible to the
 22 naked eye.

23 ^{11/}This misinformation and deceit continues and is compounded by Grace's ongoing public
 24 statements. For example, Grace's website encourages homeowners to feel safe when working with
 25 and around Zonolite attic insulation:

26 Grace took steps to remove fibrous tremolite from the vermiculite used in Zonolite® Attic
 27 Insulation . . .

28

- Asbestos fibers in the attic space during installation were at a level well below what was then
 considered a permissible lifetime occupation exposure.
- Air sampling indicated no asbestos fibers were detected in the attic within six hours after
 installation.

29 Based on these results, Grace concluded that no unreasonable risk of injury was posed to a
 30 homeowner installer.

(continued...)

nor has Grace warned homeowners that Zonolite Attic Insulation contains toxic levels of asbestos. As a result of Grace's failure to warn and affirmative misstatements of fact, many thousands of homeowners remain ignorant of the dangers to which they and their families may be exposed.

Class member John Holbrook's experience illustrates this point. John Holbrook and his family have over the years engaged in typical homeowner renovation activities, and use their attic area for storage. Because the Holbrooks were not advised or warned that Zonolite Attic Insulation contained asbestos, they conducted their work and accessed their attic storage area without taking important safety precautions. Aff. of John Holbrook (July 21, 2000) (Exhibit 45). Now the Holbrooks face an uncertain future risk to their health, are uncertain what home repairs they can or cannot make, and are concerned that living spaces in the home are contaminated. The circumstances of the Holbrook family illustrates that routine homeowner renovation activities taking place in homes threaten public health and safety and present dangers that could be mitigated through an appropriate nationwide notification program to homeowners,^{12/} who are at risk due to no fault of their own.

In addition to the demonstration of anecdotal information documenting lack of homeowner knowledge as to the Zonolite Attic Insulation problem and how to deal with it, plaintiffs' counsel commissioned a statistical marketing research survey in the State of Washington to assess the level of homeowner awareness or lack thereof of the problem. The survey, which was admitted into evidence in the *Barbanti* hearing, was conducted by a professional marketing consultant and determined that approximately 90 % of homeowners surveyed were not aware of the problem or how to deal with it.^{13/} Needless to say, one cannot take appropriate safety precautions or

11/*(...continued)*

¹²For similar illustrations, see Affs. of Rand Hatch (July 20, 2000) (Exhibit 46), Ralph Busch (July 20, 2000) (Exhibit 47) and Brendan King (July 19, 2000) (Exhibit 48) (homeowners who were unwittingly exposed to airborne asbestos while engaged in typical home renovation activities).

¹³ Washington State Survey Summary Report (October 2000) at 6 (Exhibit 49). It should be noted that Washington homeowners have been exposed to more media coverage of the problem than other markets due to the presence of Grace vermiculite expanding plants in the state and the occurrence of an extensive series of articles in the *Seattle Post Intelligencer*. The *Intelligencer* has (continued...)

1 hire properly trained safety personnel (as the EPA recommends) if one is unaware of the presence of
 2 Zonolite Attic Insulation in the home or its risks.

3 In sum, the members of the class face a common risk in the form of asbestos
 4 exposures and property contamination resulting from uncontrolled disturbance of Zonolite Attic
 5 Insulation, and are in need of a common solution – accurate hazard information on risk assessment
 6 and hazard abatement.

7 **IV. ARGUMENT**

8 In considering whether to certify this case as a class action, the Court must first
 9 determine that the numerosity, commonality, typicality and adequacy prerequisites of Rule 23(a) are
 10 satisfied. Fed. R. Civ. P. 23(a)(1)-(4). *See Amchem*, 521 U.S. at 613. If the requirements of Rule
 11 23(a) are met, the Court must then decide whether one or more of the three criteria set forth in Rule
 12 23(b) are satisfied. *Amchem*, 521 U.S. at 614.

13 This case is ideally suited for class treatment. If plaintiffs prevail on liability, the
 14 entire class will benefit from a uniform asbestos notification, education and remediation program.
 15 Class treatment of such claims is routine. *See, e.g., In re School Asbestos*, 789 F.2d 996, 1008-11
 16 (3d. Cir. 1986) (defective asbestos-containing building products); *In re "Agent Orange" Prods.*
 17 *Liab. Litig.*, 100 F.R.D. 718, 724 (E.D.N.Y. 1983). Where a defendant has caused injury through its
 18 manufacture, distribution, and fraudulent marketing of a dangerous product, a class action enables
 19 common proof of the dangerous nature of the product and of the defendant's wrongful conduct.

20 **A. Applying A Washington Class Action Rule That Parallels F.R.C.P. 23, The**
Washington State Court Properly Certified A Statewide Class Seeking Identical
Relief In The Companion Case, *Barbanti v. W.R. Grace*.

21 This Court will, of course, make its own independent analysis of the class
 22 certification issues. However, a review of the *Barbanti* court's reasoning is instructive. *Barbanti v.*
 23 *W.R. Grace & Co.* No. 00-2-01756-6 (Sup. Ct. Nov. 28, 2000).

24

25

26

27

¹³/(...continued)
 played a lead role nationally in coverage of the Grace vermiculite issue. Thus, there is every reason
 to expect that homeowner awareness of the problem will be greater in Washington State than around
 the country.

1 The *Barbanti* court, applying state rules that track Fed.R.Civ.P.23, first found that
 2 plaintiffs met the four requirements of Rule 23(a): (1) numerosity; (2) commonality of questions of
 3 law or fact; (3) typicality of the claims of class representatives; and (4) adequacy of representation of
 4 the class's interests. The *Barbanti* court held that defendants had not challenged plaintiffs' estimate
 5 that Zonolite Attic Insulation was installed in 900,000 homes nationwide, which establishes
 6 numerosity. The court further found that the commonality requirement was met by "[p]laintiffs'
 7 focus on a common course of conduct by the defendants towards all potential class members," and
 8 by the fact that "plaintiffs seek equitable relief for the class as a whole in the areas of warnings,
 9 education, and remediation, not individual relief." *Id.* at 3. As to typicality, the court held that
 10 where "'the same unlawful conduct . . . affects both the named plaintiff and the rest of the putative
 11 class,'" the typicality requirement is usually satisfied, "'despite disparities in individual factual
 12 scenarios.'" *Id.* at 4 (*quoting Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226, 230 (E.D. Pa. 1999)).

13 The *Barbanti* court also rejected Grace's arguments, that the class representative was
 14 inadequate because of "claim splitting." The *Barbanti* court correctly held: "In a class action, the
 15 concept of 'claim splitting' is less of a concern than it would be in an individual action. It can be
 16 more efficient to manage some issues in a class action setting, i.e. liability issues, and this will not
 17 preclude individual litigation of other claims, i.e. personal injury claims." *Id.* The *Barbanti* court
 18 also rejected Grace's other boilerplate arguments regarding the adequacy of the class representative.
 19 *Id.*

20 Turning to the question of whether the relief sought was properly characterized as
 21 injunctive as opposed to monetary, the *Barbanti* court held that the notification program, the
 22 development of safety procedures and remediation techniques, and prospective remediation were
 23 primarily injunctive in character.

24 Given the lengthy proceedings and evidentiary record that led to a detailed analysis of
 25 identical issues in *Barbanti*, plaintiffs submit that the *Barbanti* decision is highly instructive to the
 26 analysis of issues before this Court.

27
 28

1 B. The Class Satisfies All of the Prerequisites of Rule 23(a).

2 1. Joinder Is Impracticable and Common Questions of Law and Fact Are

3 Shared Among the Class.

4 Rule 23(a)(1) requires that the class be so numerous that joinder of all members is

5 difficult or impracticable. Here, defendants do not dispute that the proposed class comprises

6 thousands of people, and is sufficiently numerous to make joinder impracticable.

7 Rule 23(a)(2) requires that there be “questions of law or fact common to the members

8 of the class.” Fed. R. Civ. P. 23(a)(2). The commonality requirement is to be construed liberally:

9 “[T]hose courts that have focused on Rule 23(a)(2) have given it a permissive application so that

10 common questions have been found to exist in a wide range of contexts.’ The Rule does not require

11 all questions of law and fact to be common.” *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D.

12 Wash. 1996) (citations omitted). The commonality requirement is satisfied if the named plaintiffs

13 share even one question of fact or law with the grievances of the prospective class. *See e.g.*,

14 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1020 (9th Cir. 1998); *Yaffe v. Powers*, 454 F.2d

15 1362, 1366 (1st Cir. 1972); Herbert B. Newberg and Albert Conte, *Newberg on Class Actions* § 3.10

16 at 3-50 (3d ed. 1992); *In re “Agent Orange Prods. Liab. Litig.”* 818 F.2d 145, 167 (2d Cir. 1987).

17 Courts analyzing class certification of product liability claims routinely find the

18 commonality requirement satisfied because those cases tend to the focus on the product and the

19 defendant’s conduct in designing, manufacturing or distributing that product. *See, e.g., Hanlon*, 150

20 F.3d at 1020-21 (noting that the product defect class before it presented none of the individualized

21 issues attendant to personal injury cases); *In re School Asbestos*, 789 F.2d at 1009 (finding common

22 factual issues under claims for negligence and strict liability in asbestos product liability action); *In*

23 *re Copley Pharmaceutical, Inc., “Albuterol” Prod. Liability Litig.*, MDL 1013, 158 F.R.D. 485, 489

24 (D. Wyo. 1994) (common questions regarding liability existed in contaminated drug case).

25 Here, the commonality requirement is more than satisfied. The common questions of

26 fact and law include:

27 (a) Whether Zonolite Attic Insulation mined, manufactured and sold by Grace is

28 dangerous due to dangerous levels of readily airborne asbestos;

 (b) Whether Grace failed to provide adequate warnings in connection with

 Zonolite Attic Insulation;

safety; (c) Whether Zonolite Attic Insulation constitutes a present threat to health and

(d) Whether Grace intentionally concealed asbestos health hazards from consumers and government agencies responsible for public health;

(e) Whether Grace's public announcements, statements, or representation concerning Zonolite Attic Insulation were untrue, deceptive, or misleading; and

(f) Whether Grace's conduct with respect to Zonolite Attic Insulation warrants classwide equitable relief and punitive damages.

See Complaint, ¶ 58.

At bottom, this case involves a single mass-produced, standardized product and a single course of conduct over many years, i.e., that Grace engaged in a common fraudulent scheme by manufacturing, warranting, advertising, and selling asbestos-contaminated attic insulation that it knew to be hazardous to thousands, while intentionally concealing the asbestos contamination.

Complaint, ¶ 1. All persons in the class face similar health risks, and all deserve to be warned and to have the benefit of a remediation program. Commonality exists.

2. The Claims of the Representative Plaintiffs Are Typical of the Other Class Member Claims.

Rule 23(a)(3) requires that the claims or defenses of the representative parties be “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). A plaintiff’s claims will be deemed typical if “they are reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. “Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.” *Hoxworth v. Blinder Robinson and Co.*, 980 F.2d 912, 923 (3d Cir. 1992) (internal quotations, citations omitted); *Rodriguez*, 166 F.R.D. at 472 (same). “When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims. Typicality turns on the defendant’s actions toward the plaintiff class, not particularized defenses against individual class members.” *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (internal quotations, citations omitted); *Cullen*, 188 F.R.D. at 230 (citing *Baby Neal v. Casey*, 43 F.3d 48, 58 (3rd Cir. 1994)) (same); *German v. Federal Home Loan Mort. Corp.*, 885 F. Supp. 537, 554 (S.D.N.Y. 1995)

1 (typicality test does not involve an examination of the specific facts from which the named plaintiffs'
 2 claim arose, but rather an examination of the nature of his claim).

3 This is all the more true where, as here, an action seeks injunctive relief under
 4 Rule 23(b)(2). Then, there is no requirement "that the district court look into the particular
 5 circumstances of each member of the class.' . . . Actions under Rule 23(b)(2) may be more
 6 rough-hewn than those in which the court is asked to award damages." *Griffin v. Burns*, 570 F.2d
 7 1065, 1074 (1st Cir. 1978) (citing 3B *Moore's Federal Practice* ¶ 23.40 (1977)).

8 Plaintiffs' claim arises out of the present health threat created by a decades-long,
 9 company-wide practice of marketing a dangerously contaminated product, knowing that it contained
 10 dangerous levels of asbestos while concealing product hazards from consumers and public health
 11 officials. As in *Prudential*,

12 [T]he named plaintiffs here have not relied on allegations that they
 13 were singled out and defrauded by [defendant]. They have instead
 14 alleged that they suffered harm as a result of the same company-wide
 15 conduct that injured the absentee class members. The various forms
 16 which their injuries may take do not negate a finding of typicality,
 17 provided the cause of those injuries is some common wrong. In this
 instance, the alleged common scheme provides an appropriate basis for
 a finding of typicality. Since all members of the class would need to
 demonstrate the existence of this scheme, their interests are
 sufficiently aligned that the class representatives can be expected to
 adequately pursue the interests of the absentee class members.

18 *In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 312 (3d Cir. 1998) (internal quotations
 19 and citations omitted).

20 The claims of the representative plaintiffs in this action are typical of the class as a
 21 whole. They all own and/or reside in homes or other structures with Zonolite Attic Insulation. No
 22 class representative has interests adverse to those of the class as a whole. Representative and class
 23 members alike have been injured as a result of the installation of Zonolite Attic Insulation. The
 24 representative plaintiffs' and class members' claims arise from the same events and course of
 25 conduct, and are based on the same legal theories. Plaintiffs, like other class members, are burdened
 26 with substantial future operation, maintenance, and abatement needs due to the presence of this
 27 asbestos-contaminated product in their homes.
 28

1 Thus, plaintiffs' claim "arises from the same event or practice or course of conduct
 2 that gives rise to the claims of the class members and . . . is based on the same legal." *Hoxworth v.*
 3 *Blinder*, 980 F.2d at 923. The typicality requirement is satisfied.

4 **3. The Representative Plaintiffs Will Fairly and Adequately Protect the**
 5 **Interests of the Class.**

6 Rule 23(a)(4) states that the representative plaintiff must "fairly and adequately
 7 protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This criterion ensures that the class
 8 representative and class counsel will be diligent and capable in protecting the interest of class
 9 members. *General Tel. Co. v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 2370-71, 72 L.Ed.2d 740
 10 (1982), *aff'd*, 815 F.2d 317 (5th Cir. 1987); *see also Hill v. Western Electric Co., Inc.*, 672 F.2d 381,
 11 389, n.3 (4th Cir. 1982). To determine whether the criterion is met, courts look at two factors: (1)
 12 whether the named plaintiffs' counsel is competent to represent the class; and (2) whether there
 13 exists any conflict of interest between the named plaintiffs and the rest of the class. *Hanlon*, 150
 14 F.3d at 1020; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). When
 15 there is no evidence of any conflict between the class representatives and the class, this Court may
 16 presume that there is no such conflict. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24
 17 (N.D. Cal. 1977).

18 Class representatives Price, Prebil and Prebil, have demonstrated their willingness
 19 and diligence in representing the class by bringing the present action, promptly seeking preliminary
 20 injunctive relief that runs to the benefit of class members, subjecting themselves to lengthy
 21 depositions, answering numerous interrogatories and requests for production, and subjecting their
 22 homes to days of testing by teams of defendants' experts. Each of the proposed representative
 23 plaintiffs has articulated their commitment to obtaining classwide relief:

24 I basically have three objectives; three goals. One, to make sure
 25 there's notification to all homeowners of the dangers of Zonolite, to set
 26 up a fund to defray the problems with Zonolite and to cure them.
 Number two, establish protocol for the safety of those who will work
 with Zonolite in the future. Three, to establish a fund to cover the
 expenses involved with anyone working around Zonolite in the future.

27 John Prebil Depo., 31:22-32:04 (Deposition excerpts attached to the Vincent Decl.).

28 [I]t's my understanding, to represent ourselves in a class as well as we
 can, to make sure that homeowners are notified, if they have Zonolite

1 in their homes, of the dangers of Zonolite, to set up a safety protocol
2 for anyone entering a Zonolite area, and to set up a fund to cover all
expenses for anyone having to work in a Zonolite area.

3 Margery Prebil Depo., 16:9-16.

4 [P]ossibly we could get a fund or something set up here so when
5 people have a problem with their Zonolite situation, whether it be
advertising or maybe a loss of property value or going in for
remodeling, that they could draw from it.

6 Paul Price Depo., 32:7-12.

7 There are no legitimate objections to the level of plaintiffs' concern for the class.
8 Further, the proper emphasis in this prong of the inquiry is on the integrity and effectiveness of class
9 counsel. *Adair v. Sorenson*, 134 F.R.D. 13, 18 (D. Mass. 1991) (guideline for adequacy of
10 representation is "that counsel chosen by the representative parties is qualified, experienced and able
11 to vigorously conduct the proposed litigation") (*quoting Andrews v. Bechtel Power Corp.*, 780 F.2d
12 124, 130 (1st Cir. 1985)); *Chevalier v. Baird Sav. Assoc.*, 72 F.R.D. 140, 146 (E.D. Pa. 1976)
13 (certifying a class even though the named plaintiffs had "a very sketchy view" of the litigation and
14 class counsel proceeded in the case "without significant restraints from the named plaintiffs"); *In re
15 Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1037 (N.D. Miss. 1993) (noting that requiring leadership
16 by class representatives rather than class counsel in sophisticated litigation would reduce the class
17 action device to "an impotent tool").

18 Plaintiffs' proposed class counsel consist of the MDL 1376 Plaintiffs' Executive
19 Committee members and *Price* counsel, a group with extensive experience litigating complex
20 actions, including class actions, asbestos claims and consumer cases. Counsel possess the resources
21 and the will to actively and vigorously prosecute this case.

22 Rule 23(a)(4) adequacy is also demonstrated by the remedy sought here. Class-wide
23 equitable relief to forestall future injury differs radically from an individual personal injury claim for
24 compensatory damages for physical injury caused by exposure. In requesting equitable relief for the
25 class to avert future physical injury, while at the same time preserving class members' rights to
26 pursue personal injury claims in the future should they have the misfortune of contracting a disease,
27 plaintiffs serve the class members' interests.

28 The Rule 23(a)(4) adequacy requirement is satisfied.